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Calendar

November 1—Denver Bar Association regular monthly luncheon meeting, 12:15 P.M.

December 4—Legal Institute on Labor Problems, Wage-Hour Laws, and related subjects, 9:30 A.M., Auditorium of Mountain States Telephone and Telegraph Company.

Exemptions From Registration Under The Securities Act of 1933

By LELAND E. MODESITT

The preparation of a registration statement with the United States Securities and Exchange Commission requires considerable detail work and time by the attorney and considerable expense to the client. The purpose of this article is to point out and briefly explain the exemptions available for new financing programs. Since 1933 a number of acts affecting securities and security transactions have been passed by Congress,[1] but for all practical purposes it may be said that new financing by an issuer comes within the purview of the Securities Act of 1933.

The Act itself provides several exemptions and these have been supplemented by certain exemptions promulgated by the Commission pursuant to the authortiy given by Congress in Section 3(b) of the Act.

Private Offerings

The exemption available for what is commonly known as a "private" offering appears in Section 4(1) of the Act. The exact language is: "* * * transactions by an issuer not involving any public offering." What constitutes such a transaction is a question of fact for which neither Congress nor the Commission has drawn up an unequivocal definition or test.[2] The principal factors to be considered are:

[1] The Federal laws administered by the Commission are the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, and the Investment Advisers Act of 1940. The Commission also assists the Federal courts in connection with certain corporate reorganization proceedings under Chapter 10 of the National Bankruptcy Act.

[2] The various state "blue sky" laws ordinarily provide that if the issue is offered to less than a specified number of persons it constitutes a private offering and is exempt from registration with the State Securities Commission.

1. The number of offerees and their relationship to each other and and to the issuer.
2. The number of units offered.
3. The size of the offering.
4 The manner in which the offering is made.

With respect to factor number 1 above, the word "offerees" should be emphasized. Although the distinction between offeree and purchaser is an obvious one, it is frequently overlooked. On the theory of an exempt private offering, the following type of advertisement is commonly published in a newspaper or trade journal without regard for the registration requirements of the Securities Act. "Wanted—three individuals to purchase original offering of 10,000 shares of common stock of new manufacturing concern. Write P. O. Box 333 for particulars." Although there may be only three ultimate purchasers, the number of offerees is infinite and, therefore, such an advertisement in itself constitutes a public offering of securities.

It has been held that a stock offering only to individuals who were already stockholders of a corporation was a public offering.[3] A sale of a large block of stock to one person may be a private offering if he takes it for investment, but if he takes it with the intention of selling part or all of it, he becomes an underwriter and the exemption for "transactions by an *issuer* not involving a public offering" does not exist.[4] Where, prior to a contemplated public offering, the officers and directors of a new corporation purchase stock for cash or in exchange for property transferred to the corporation and intend to hold all of this stock for investment purposes, these transactions constitute an exempted private offering. The availability of this exemption under such circumstances is questioned only when subsequent events tend to disprove that the stock was originally taken for investment; as for example, when an officer who allegedly takes for investment sells some of his stock from time to time in lieu of a regular salary. If there is any question it may be desirable to submit the facts to the regional office of the Commission for an opinion.

Intrastate Offerings

If the new corporation can best distribute its securities in the state of its domicile because the officers and directors are well regarded there or there is considerable local interest in the company's prospects, it should take advantage of the exemption provided by Section 3 (a) (11) of the Securities Act, which exempts "Any security which is a part of an issue sold only to persons resident within a single state or territory, where the issuer of such security is a person resident and doing business within, or if a corporation, incorporated by and doing business within such state or territory."

[3] S.E.C. vs. Sunbeam Gold Mines Co., 95 F(2nd) 699; Merger Mines Corp. et al vs. Crismer, 137 F(2nd) 335, 320 U. S. 974, 88 L. Ed. 478.

[4] Merger Mines Corporation vs. Crismer, *supra*.

Since this exemption is unlimited in amount and requires no action whatever, it is subject to abuse, and is, therefore, strictly construed. The convenient of the exemption was so tempting that in one case dummy corporations were incorporated in several states. Each of these companies distributed its stock in the state of its domicile, but the aggregate proceeds from stock sales went to the operating company. In such a case, form will be disregarded for substance and the exemptions sought will be disallowed. The issue to be sold under the exemption must be clearly differentiated from other offerings sold to non-residents. Although the creation of a certain "class" of securities for intrastate offering seems to be the most practical solution where the corporation also desires to sell to non-residents, such a plan is not necessary and under some circumstances it is not satisfactory. A block of authorized but unissued common stock may constitute a separate "issue" if it is to be issued for the first time and has no connection with previous offerings of the same class of stock. On the other hand, a Class A common stock and a Class B common stock which are substantially identical would not be separate issues under this exemption, where it is intended to make a simultaneous offering of one to residents and of the other to non-residents. Of course, the exemption would not apply where the securities are initially sold to a resident who proceeds to redistribute them to non-residents. This does not mean that sales through an underwriter defeat the exemption. Sales may be effected through an underwriter if the ultimate distribution is to bona fide residents. Where stock is issued to promoters in exchange for property or services as a "private offering," this may destroy the intrastate exemption on a simultaneous offering to residents for cash, if one or more of the promoters is a non-resident. However, both examples may be available if two classes of stock are being offered, one class under each exemption, and there is a substantial and not merely nominal difference in rights of the two classes.

Exemptions Under Regulations Adopted by the Commission

The legislative authority for other exemptions is Section 3(b) of the Securities Act which provides: "The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this title with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $300,000."

The exemptions heretofore mentioned are preferred because they involve only factual compliance by the issuer. However, if the offering does not qualify under one of these, one of the exemptions under the Commission's

regulations, particularly Regulation A, is probably available. The provisions of these regulations will be discussed briefly.

Regulation A

Under this regulation a public distribution of securities, the offering price of which does not exceed $300,000, is authorized in any twelve-months period if made by the issuer. If the distribution is made for the benefit of a controlling stockholder of the issuer, the offering price may not exceed $100,000. If a public distribution is made by both the issuer and such controlling stockholder in the same twelve-months period, the aggregate amount may not exceed $300,000.

Qualification for the exemption involves filing a letter of notification with the Commission five days prior to the offering date. It can be prepared quickly by one reasonably informed of the facts, although it may be troublesome to promoters whose plans are still in the embryonic stage. The letter must state the name and address of the issuing company, the full names and addresses of its officers and directors, the amount of securities proposed to be offered, the names of underwriters, if any, and the amount of commissions and underwriting expenses, the amount of securities offered *to the public* for consideration other than cash, and the amount of securities offered within a twelve-months period preceding the present offering date. The approximate date of the proposed public offering and a brief statement of the purposes for which the proceeds will be expended must be set forth.

Three-page forms for this letter of notification under Regulation A are available at any regional office of the Commission.

If sales literature, including a promotion letter, a written opinion of some technical expert or a prospectus, is used, Rule 223 requires that copies be filed in triplicate with the Commission five days prior to their release. Paragraph (c) of the above rule, quoted below, explains what disclosures are mandatory in all sales literature.

> "No written communication, advertisement, or radio broadcast, shall be used * * * unless it contains the following information:
>
> "(1) The name of the person or persons by, on behalf of, or for the benefit of whom the securities are being offered.
>
> "(2) The number of shares or other units being offered and the amount of underwriting discounts or commissions per unit or, if none, the perunit amount of expenses incurred or to be incurred in connection with the distribution of the securities (estimate if necessary).
>
> "(3) The aggregate amount of underwriting discounts and commissions, or, if none, the aggregate amount of expenses incurred

or to be incurred in connection with the distribution of the securities (estimate if necessary).

"(4) If the securities are being offered by, on behalf of, or for the benefit of the issuer, the purposes for which the net proceeds from the securities are to be used."

On the first page of such sales literature, in type as large as that generally used in the body thereof, a statement in substantially the following form must appear:

> **"Because these securities are believed to be exempt from registration they have not been registered with the Securities and Exchange Commission; but such exemption, if available, does not indicate that the securities have been either approved or disapproved by the Commission or that the Commission has considered the accuracy or completeness of the statements in this communication."**

If these matters are set forth, the sales literature may contain whatever additional information the seller wishes to convey to respective purchasers.[5] There need not be filed copies of any advertisement or communication which does no more than identify the securities, state the price thereof, and state by whom orders will be executed.

Securities Excluded From The Regulation A Exemption

Rule 221 explains what securities do not qualify for the Regulation A exemption. Generally speaking, a majority of these are issues, the issuers or underwriters of which have been found guilty of federal or state security violations. Securities not in the above category which are excluded from the general exemption of Regulation A are: securities of investment trusts or investment companies, fractional undivided interests in oil and gas rights, and interests in oil royalty trusts.

Assessable shares in mining companies are not explicitly excluded from the Regulation A exemption. However, the ruling that "the offering price of assessable securities shall include the aggregate amount of all assessments legally leviable thereon at the time of the offering thereof or at any time thereafter" makes the Regulation A exemption practically unavailable for offerings of assessable shares. For mining securities subject to assessment, an exemption is available under Regulation A-M, the provisions of which are briefly discussed below.

[5] The following admonition appears in a note to Rule 223: "The material filed pursuant to this rule is required to be filed solely for the information of the Commission to aid it in the enforcement of Section 17 of the Act, and not for the purpose of enabling the Commission to cite any deficiency in the information contained therein. The failure of the Commission at any time to take action upon any information filed pursuant to this rule does not indicate that the Commission considers the information accurate, complete or not misleading."

Regulation A-M

This exemption for assessable securities of mining corporations is limited to $100,000 in any yearly period, and regardless of amount, not more than one offering may be commenced by the issuer in any period of one year. A prospectus containing certain information must be presented to each person to whom the shares are offered at the time of the initial solicitation of each such person.[6] Three copies of this prospectus should be filed with the appropriate regional office of the Commission at least ten days prior to the use thereof, and such copies should be accompanied by a letter of transmittal, showing the aggregate offering price of the issuer's securities being currently offered to the public and the aggregate sales price of the issuer's securities sold to the public for its account within the year previous to the filing of the prospectus.

The regulation requires that the notice of assessment sent to each stockholder shall be accompanied by a statement setting forth certain information,[6] and that three copies of such statement shall be filed ten days prior to the use thereof. In general, this statement informs the stockholder about the amount of funds previously raised by the company, the purposes for which the funds were expended, the improvements and development work at the mining property through the use of such funds, the existence or nonexistence of developed ore reserves, the location and history of the property, the character, extent and condition of underground workings, the nature of titles to the property noting any defects or liens thereon, the aggregate amount of present assessment and the purposes for which it will be expended.

Regulation B

This regulation provides an exemption for offerings consisting of undivided interests in oil and gas rights, the total offering price of which does not exceed $100,000, upon filing an offering sheet with the Commission and fulfilling certain other conditions.

The exemption is not available if the offeror is an unregistered "dealer," as that term is defined in the Securties Exchange Act of 1934,[7] or if the operating lessee owns or will own less than a forty per cent (40%) working

[6] The statements required in both the prospectus and the assessment notice are itemized in *The General Rules and Regulations Under the Securities Act of 1933*, a copy of which may be obtained from the Philadelphia office or any regional office of the Commission. As reference to an official publication should be made by each applicant for exemption, a thorough discussion of the required disclosures is not attempted in this article.

[7] "The term 'dealer' means any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, or any person insofar as he buys or sells securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business."

interest in the tracts involved, or less than forty per cent of the one hundred per cent of all gas, oil and other hydrocarbon substances produced.

Offering Sheets

The Regulation prescribes that the factual data required in the offering sheets shall be submitted on the appropriate schedule.

These schedules are:

Schedule A. If the interests offered are producing landowners' royalty interests.

Schedule B. If the interests offered are non-producing landowners' royalty interests.

Schedule C. If the interests offered are producing overriding interests, working interests, or participating interests.

Schedule D. If the interests offered are non-producing overriding interests, working interests, or participating interests.

Schedule E. If the interests offered are oil payments, gas payments, or oil and gas payments to be made from tracts represented to be producing at the time of the offering.

Schedule F. If the interests offered are oil payments, gas payments, or oil and gas payments to be made from tracts represented to be non-producing at the time of the offering.

Although these schedules vary in certain particulars according to the type of interest being offered, the same information, broadly speaking, is required on each of them.

The first part of the schedule is a separate page in the form of a notice to investors which states, in general, that the Commission has not approved or disapproved the interests, that the offering sheet must be delivered to every person solicited, that any payment received by the purchaser of an interest should not be considered as income until the capital invested has been returned, that the offeror shall supply each purchaser with satisfactory evidence of title, and that no estimation of the amount of recoverable oil which is not included in the offering sheet has been used to induce the sale.

Following the standard notice described above, the offeror must set forth information relative to the size of the offering, the nature of the interests offered, whether drilling was every attempted on the instant tract and its proximity to producing wells, and whether any representation is made that the drilling of a well on this tract is contemplated which will increase the value of the tract. Exhibits to be incorporated in the offering sheet comprise a copy of the deed or other instrument of conveyance and a plat of the tract involved and the surrounding area to a distance of one-fourth of a mile on all sides showing lease boundaries and the names of farms and operators on

the tract and data upon any wells previously drilled on the tract. Instruction sheets for each type of schedule are available at any office of the Commission.

Other Conditions of Exemption

In addition to the preparation of the offering sheet, the other conditions are:

(1) Filing of four copies of the offering sheet with the Commission.
(2) Delivery of a copy of the offering to every person solicited at the time of the original offer to sell.
(3) Offering sheet must be fully effective in all respects at the time of the initial offer and at the time of making each contract.
(4) Offeror shall furnish evidence of title satisfactory to each purchaser.
(5) Filing of a report of sale within fifteen days of the contract of sale, such report to be kept confidential.[8]

Cases In Which Offering Sheets And Other Conditions Are Not Required.

Compliance with the procedure outlined above is not required, provided all prospecti, circular letters, or circular communications sent through the mails to be used in lieu of an offering sheet are filed simultaneously with the Commission, when the transaction is one of the following:

(1) Offers to persons regularly engaged in the production of oil and gas.
(2) Offers to a registered dealer who maintains a bona fide place of business in the state where the oil and gas property is located.
(3) Offers to a registered dealer, who does *not* maintain a place of business in the state where the property is located, upon condition that such dealer files a written report of the sale within fifteen days thereafter.
(4) Offers to a corporation or trust, not required as a dealer, assets of which consist principally of oil or gas rights, if stock of such corporation or trust is registered under the Securities Act, on condition that the offeror file a report of the sale within fifteen days thereafter.

The requirement that estimates of the amount of oil and gas recoverable from the tract involved or from any other tract for comparative purposes cannot be used in connection with an offering unless incorporated in the offering sheet on file shall not apply to sales to persons regularly engaged in the production of oil and gas.

There are no fees in connection with applications for exemptions from registration under the regulations mentioned herein

Oil royalty trusts offering shares of interest may apply for exemption under Regulation B-T, which is not discussed in this article because of its very limited application.

[8] The Commission furnishes a standard 2-G form upon which these reports may be submitted.

How the Legal Profession Can Aid The Cause of Good Government

By HON. KIM SIGLER, *Governor of Michigan.*

Reprinted by permission from The Detroit Lawyer, monthly publication of the Detroit Bar Association, April 1947.

Anything can happen in the legal profession these days.

There is one thing I would like to see happen, for the good of my own profession and for the cause of good government: A re-awakening in every lawyer of the spirit of public service and a personal interest in government.

Without this spirit, very real dangers can confront us; with it, much can be done to improve our own professional standards and the quality of of our government.

The lawyer, it is true, is no less awake to the needs of public service than the average good citizen of other professions who will not interest himself in government; but he has a greater responsibility because, by training and experience, the lawyer is the man best qualified to lead his community on matters of public interest.

In our early days as a nation, the lawyer was the natural leader in good government. His professional position made him a respected citizen when counsel was sought. He responded unselfishly to the call.

With the development of educational opportunities and the expansion of communication facilities, an informed public felt less dependent on the lawyer for advice on general subjects. Therefore, the decline of public leadership in the bar has not been so much a refusal of lawyers to serve, as a feeling by a more informed public that such services were increasingly unnecessary.

In the early days, the original issues of government presented involved Constitutional issues which only the lawyer could deal with effectively. As time passed, these Constitutional issues were, in a large measure, settled by the courts and questions of policy were then presented. When the storms and strains of deciding early issues had passed, the people receded into a state of lethargy, permitting their government to be taken over by those who were willing to serve in public offices, whether or not they were qualified by training, experience, or integrity. Infrequently, the public had a rude awakening when examples of misfeasance in public office came to their attention.

The bar, together with the public, was satisfied to let government run by proxy. The business of government is too impossible to each of us to run on such a basis. We must be watchful and jealous of our liberties, lest they be lost to us.

The medical profession knows that socialized medicine is becoming a

definite possibility in this country, and accordingly is beginning to take steps within its own ranks to combat that threat.

How many of us have realized that without certain safeguards set up within the legal profession, socialized law also is a possibility? It is true that there is yet no Congressional bill like the Murray-Wagner-Dingell bill for state-supported medicine, but that is no excuse for complacently and smugly ignoring the threat.

Service is the surest way to prevent the curse of socialized law—of having a government agency come in and tell the lawyers whom they should take as clients, what their compensation should be, and all the rest. Service is an old-fashioned word which too many citizens in all walks of life have allowed to fall into disuse. There should be a revival of the ideal of service.

Too long have we delayed the renaissance of personal responsibility in the business of our own government. In this move to recapture government for the people, the lawyer should play an important role. I believe he will respond to the challenge as he did in the past. How then, can he contribute to good government?

1. By the encouragement of members of the bar to serve in any worthwhile public capacity. Their answer might be that the personal sacrifice is too great because of the loss of income. While this is true, some lawyers are making this sacrifice, and many others could. There can not be good government without sacrifice by some.

Unfortunately, such sacrifice often goes unappreciated by the public, and criticism may be the sole reward. A growing appreciation by the public of what public service entails might be very helpful in getting the type of men we need. Bar associations, through public relations programs, could be of service in bringing to the average citizen a general consciousness of the many problems which confront the men and women who serve their government in an official capacity.

2. By bar association sponsorship of active legislative committees to study not only proposed legislation affecting the legal profession, but all suggested laws.

The legal profession could perform an outstanding service to the public in this respect. Every two years, the legislature passes anywhere from 250 to 500 new laws, or modifies old ones. It considers hundreds more each session. Theoretically, laws are passed for the greatest good for the greatest number of citizens.

Frequently, however, it seems our statute books have on them legislation which at best benefits only a small group and sometimes works a hardship on the majority of the people. Some are clearly nuisance laws, while others are well-meaning but do not accomplish the purpose for which they were passed. Still others have outlived any usefulness they might once have had.

The public has a right to be protected from a flood of laws, and every law that is not, or cannot be, enforced is worse than no law at all.

An active legislation committee, therefore, could serve in two ways: Study proposed laws before they are passed and give publicity to their findings; and serve in an advisory capacity for the repeal of unwise, unnecessary or unworkable laws now on the statute books.

The average citizen, untrained in the fine points of the law, often needs expert advice before he makes up his mind on a matter. How helpful it would have been to the State in its current financial crisis if more public-spirited lawyers had spoken up and explained what the diversion of the sales tax would do, or had assisted in making the amendment a workable one instead of the ambiguous provision which had to be taken to our State Supreme Court for a legal decision.

I suggest that the legislative committee of the bar association study every bit of proposed legislation with the following questions in mind:

1. Is it administratively feasible?
2. What will its effect be on the citizen?
3. Will it accomplish what is intended?
4. Will its apparent benefits outweigh the restraints which necessarily follow all new legislation? Financial burdens and other liabilities frequently result from new laws.

I am convinced that if there were public discussions of pending matters, with attorneys taking the lead, resulting statutes would be of a much higher order. There should be none of this business of sitting idly by while bad laws are being passed.

Such a service by lawyers interested only in the general welfare of the State, without any special axe to grind, also would be a help to a legislature which often is subjected to terrific pressure from special groups and needs disinterested, expert advice.

It is a physical and mental impossibility for the lawyer, let alone the private citizen, to keep abreast of all the state and federal laws and rules and regulations. While there is not much that we in Michigan can do about the federal problem, the bar associations could perform a great service to the State by working with the legislature for the repeal and elimination of unnecessary laws, and the consolidation of others.

3. The legal profession can help the cause of good government and the general welfare by encouraging the bar association committees on ethics and grievances to function actively in all cases to see that the high degree of professional integrity we all prize is maintained, and that public confidence in the profession remains high. For instance, we should make sure that exorbitant fees for legal services are not charged to those who need our advice but cannot afford to pay high fees.

The various bar associations could—and should—expand existing legal aid departments and establish new ones where necessary to serve as referral

agencies for the men and women who need legal aid but do not know to whom to go. This would be of great assistance in curtailing the activities of the "curbstone lawyers," who all too often give freely of bad and costly advice to the uninformed layman.

4. The legal profession working through its bar associations could awaken a public realization of the need for more adequate pay for the judiciary in many parts of the State. Michigan has an outstanding judiciary, free from the abuses which have been allowed to creep in in some other states, but in many parts of Michigan the judges are sadly underpaid for the functions they have to perform. Moreover, without any provisions for a retirement income when they become ill or for their declining years, many must continue to sit on the bench at a time when they can no longer perform the services required of them. This becomes an economic problem.

This, on the whole, makes the position unattractive to many well-qualified men who might otherwise aspire to contest the incumbent judges, or seek to fill vacancies. It is not part of our democratic system to perpetuate one person, no matter how capable he may be, in office.

For that reason, I advocate that the bar associations work actively to bring the salaries of all judges to a level that will adequately remunerate present members of the judiciary and attract others to it. I also urge support of proposed legislation to provide a pension for judges when they reach retirement age.

5. The lawyers, through their bar associations, should work actively to bar boards and commissions from sitting as judicial bodies, especially on appeals from their own findings.

There has been an alarming tendency in this country during the last fourteen years to substitute administrative interpretation of laws for the judicial interpretation which is one of the most important aspects of our Constitutional system of government.

This is a tendency which the bar associations and the individual lawyer, serving both as a private citizen and as an arm of the court, should condemn and start fighting right now.

It is my firm conviction that the executive branch of the government should have no power over the judicial interpretation of the laws. His only connection with the judiciary should be on the occasions when he is called on to appoint a judge to fill a vacancy, and to see to it that the laws of the State are administered.

Instead, we see all kinds of people acting as judges—members of boards and commissions who sometimes have no legal training, or only a limited experience in courts.

This is absolutely contrary to our concept of government which as a safeguard to the rights of the citizens of the United States directed the separation of the powers of the executive, legislative and judicial branches.

Some lawyers are partly to blame for this so-called "streamlined govern-

ment," or mis-government, we exist under today. It has resulted, partially, because too many lawyers are too prone to adjourn and postpone decisions in the lawsuits they are trying—conduct often condoned by the courts. As a result, through a desire to hurry matters along, a system of administrative interpretation of rules and regulations has developed.

Any lawyer who has ever tried a case before either a State or Federal board or commission can point out some of the evils inherent in such a system.

The boards and commissions are answerable only to the executive who appoints them. Therefore we have an administrative, or political, determination of the law instead of a judicial decision. These administrative bodies often are too inclined to promulgate rules and regulations which will carry out the administrative policy, either of the department or the chief executive, rather than adhere to the law passed by the legislative branch of government.

Moreover, evidence presented at the hearings is gathered by a staff employed by the board which is considering the case. Human nature being what it is, it is natural for the board to give great weight to the evidence or information presented by its own men.

The greatest evil in this practice of administrative bodies usurping judicial functions lies in cases where the boards or commissions not only decide the facts, but act as an appeal board on the same cases which they already have decided. It is ridiculous to imagine that any man is qualified to pass judgment on the merits of his own previous decisions, but it happens every day.

There is a remedy for this situation, one that is both simple and workable.

I propose that as soon as practical, all state boards and commissions be stripped of their right to hear appeals from their own decisions.

Instead, I would recommend a new court to hear all appeals from commissions. Such a court would have several members, each a specialist in various fields of government such as utilities, workmen's compensation, unemployment compensation, labor and liquor.

This court could perform two valuable functions: It would give full judicial review to all cases arising from the administrative decisions of the boards; and it would relieve the State and Supreme Court of a heavy burden and leave it more time to devote to other judicial duties. This method also would result in a more prompt determination and disposition of cases.

Perhaps some of you may raise the question of expense. Certainly, the salaries for such a court would have to be adequate to attract competent talent. But there also would be compensating savings.

A special appeal court could result in the reduction in the number of members on many of the full-time boards, and much of the secretarial and clerical help also could easily be dispensed with. The cost of this new system could conceivably be less than that under which we are now operating.

Expense, however, is not the primary consideration. The important thing is to develop a more efficient, more just administration and interpretation of laws, rules and regulations. This must be done within the framework of our Constitution, or we are in danger of losing by our own negligence and indifference the important safeguards to individual liberties that are essential to our system of government. At a time when the false prophets of foreign systems are boring for a foothold in the United States, it is nothing but folly to permit any weaknesses to develop in our own system.

There is no question about it. The lawyer has a great responsibility for good government, both as a well-trained individual and as a member of the bar associations which can exercise leadership in this respect.

It is a challenge to every attorney and every member of a bar association to answer demands for his time as a public servant, to interpret and explain to the public the meaning of all types of new laws, and to work to check the spread of the administrative courts.

The lawyer must consider himself not only a branch of the court, a specialist in his own field, but also as an apostle of good government.

New Members Admitted To Bar Association

Miss Onalee Brown, Harold Dwight Lutz, Arnold Reeve Gilbert, Woodruff Anderson Morey, Willard Strong Snyder, Robert Hendricks Darden, John Joseph Weber, Theodore Jean Kuhlman, and Harold C. Greager.

Widow's Allowance

By C. EDGAR KETTERING, *County Judge*

From the frequency of my conferences with attorneys on the subject, I think it may not be amiss to comment on two phases of the law of widow's allowance in estate matters:

1. The case of *Wigington v. Wigington*, 112 Colo. 78 seems to have settled the proposition that a petition for widow's allowance must, like any other claim, be filed within six (6) months of the issuance of letters of administration; the order for the allowance, or the widow's choice of property (cash or specific property) need not be made within such period. Such case also states that the petition should be sworn to and recite that the widow is a resident of Colorado. It would also be good practice for the petition to recite the date of the issuance of letters.

2. There seems to be some confusion as to the meaning of Sec. 211, Chapter 176, and the wording is not too clear. I believe the statute means that where the deceased left a widow only, or a widow and children born to such marriage, the allowance to the widow shall be $2,000.00, with nothing to the children. The division of $1,000.00 to the widow and $1,000.00 to minor children applies only where such children are the children of the deceased but not the children of the widow; in other words, are her step-children.

What a Client Expects of His Lawyer

By MAURICE H. WINGER *of the Kansas City Bar*

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It is timely and appropriate that lawyers should consider subjects of particular interest to their own well-being. A review of leading legal publications and proceedings by Bar Associations discloses that remarkably few subjects are discussed bearing upon the progress or prosperity of the individual lawyer. We consider and discuss at great length legal principles and precedents, improving legislation and procedure, prepare and deliver or listen to great scholarly addresses, write or read profound discussions, all matters of great interest to our profession as a whole. But all too often we neglect consideration of those practical questions which have to do with or are of individual benefit to the lawyer in his personal relationship to his client and are of practical consideration in promoting and developing his own best interests. In business trade associations are organized and conducted for the benefit of the individual members of the industry or trade involved. It would seem to be wise for lawyers' associations to spend at least a part of their time and energy for the individual benefit of the members of the association, that is in consideration of subjects that are of practical importance to the lawyer in the conduct of his professional life. My subject is practical and does not require or permit of the scholarly approach. What does a client expect of his lawyer? I shall approach the subject from the standpoint of the business man's lawyer. The business man is interested in practical considerations. We are living in a changing world. This must be recognized by the lawyer who would serve his client best. As was said by Mr. Louis F. Jordan in an article in a recent issue of the American Bar Association Journal:

"If it can be said that war has changed our educational system, it can be pointed out with the same accuracy that something has changed not only present-day law practice, but also the kind of arena the young lawyer will find as he emerges from law school with his diploma and his degree."

The practice of law is less spectacular and more exacting than in the old days. To quote again from Mr. Jordan:

"The complexity of present day existence is such that time is a vital factor in the administration of justice; lawyers (and clients as well) are more anxious about succeeding in the quickest way rather than play to the galleries and thrive on publicity. They are becoming less the actors they used to be, and more the cold and calculating scientists of the law; more the surgeon with a steady scalpel, relying on scientific exactitude, rather than dramatics and the play on emotions."

Advice

The first thing a client expects of his lawyer is *sound advice*. Regardless of whether a lawyer is consulted about a lawsuit, the organization of a corporation, a complicated scheme of financing or reorganization, the drawing of a contract, the preparation of a will or a trust, or anything else, the client expects his lawyer to give him correct advice on what he can and cannot do, and the lawyer must have courage enough to advise him correctly and fearlessly. A client has the right to expect his lawyer to find a way to accomplish his purpose if it can be done. This frequently requires legal ingenuity, but care must be exercised in trying to give a client the kind of advice he wants. A client should expect a frank and honest opinion based on a full understanding of all the facts which may frequently be hard to get from the client. No advice should be given until all the facts have been fully disclosed, and then only after a careful investigation of the law as applied to the particular facts involved. A good client should not expect more, and the lawyer in justice to himself can do no less. A client may frequently request quick advice on an important matter in a conversation over the telephone. Giving such advice under such circumstances is always dangerous and can easily result in the loss of a good client. It is a good rule never to give legal advice over the telephone. There is no record of what has been said and the door is left wide open for misunderstandings. When a lawyer is compelled to answer a legal question in a telephone conversation with a client the only safe way to proceed is to confirm the advice by letter, reciting the facts as disclosed to him and stating clearly and concisely the advice given. It is always disturbing and unpleasant to be compelled to give a client advice which he does not want to hear. It is the best practice to give such advice in writing and fortify yourself with a memorandum of facts and authorities, which, if not communicated to the client, should be kept in your own file on the subject. A client always expects a positive opinion. Unfortunately the law is not such an exact science that an unqualified opinion can always be given. In these days of divided opinions by courts of last resort, new constitutions and new codes which have not been construed, many of us have found it necessary to change opinions which have been long held to conform to the latest decision which may have been rendered by a divided court. The best a lawyer can do under such circumstances is to advise his client what the latest ruling of a majority of the court is on a given subject, and in many instances tell him that it will take a trial and probably an appeal to determine the particular question presented.

Advice on Business Questions

It should not be necessary to say that a client expects his lawyer to be honest and to have good judgment. To what extent a client has the right to expect his lawyer to have and use good business judgment in advising on legal questions is a matter for serious consideration. Many times legal and

practical questions are so intermingled and dependent that the lawyer finds himself compelled to consider them together. This is particularly true of a businessman's lawyer. In such cases the lawyer who has sound business judgment as well as legal ability is most fortunate, as also is his client. A businessman's lawyer can expect to be confronted with such situations many times. It therefore behooves him to study business as well as law if he would render the best service to his client. It is always safe, however, to remind a client that ultimate decisions on purely business questions are the decisions of the client and not the lawyer.

I was impressed by some of the remarks of Mr. Justice Burton at the American Bar Association meeting. He said:

"Many a business lawyer feels that the day is lost when he or his client spends it in court. He tries to keep so well within the law that his clients never will have to sue and never will be sued, so that it is only with disappointment that he finds himself now and then in litigation."

Continuing, Mr. Justice Burton told the meeting:

"I like to think of the business lawyer's practice as constructive practice. Business law supplies a creative service that is as essential to modern industry as is engineering and finance. The business lawyer shares in the creation of the prosperity and enterprise of the nation just as do the businessman, engineer, and the financier."

As was said by a distinguished Boston lawyer, Mr. Sherman L. Whipple:

"It will be admitted, too, or rather, I should say, we assert with pride, that the lawyers today are more businesslike in the conduct of professional work than in former times. They understand business and business problems better than ever before. In the development of their practice it has been necessary for them to study and master problems of manufacturing, of commerce, of transportation, of engineering, of mining, and of a multitude of callings when they have been called upon to advise about, or to litigate, cases involving such questions, and in this way as well as other ways they have acquired skill and judgment in business matters. In the larger offices there exists today a higher efficiency, a better organization, and more systematic methods than existed so recently as half a century ago. We might concede the accuracy of the entire statement, but for the implication it carries that, by the adoption of business methods and businesslike organization, and by familiarity with business principles and problems we have somehow sacrificed something that was, or is, of value to our standing as professional men. But let us assume that we lawyers, or some of us, have become men of business. What of it? Is it still a disgrace or something contemptible to be a man of business? Is it asserted, or to be implied, that we as a profession are somehow above business and businessmen and our dignity of position is lost by association with men of affairs? . . .

"I believe, on the contrary, that the ideals of our profession are today as fine and pure, the sense of honor as keen, the moral discrimination as sharp,

and the character as worthy, as they have ever been. . . . I believe it to be a fact that the lessening of popular prejudice against us, and the higher esteem and regard in which the profession is held today are largely due to the change in attitude and function which has been noted. Much of the aloofness of the profession has disappeared. There is less, I believe, of the supercilious arrogance of superior education and mental discipline. The close contact with business and the application of our abilities to business problems have been a benefit alike to the profession and to businessmen. . . .

"I see naught in the change that has come to be regretted or deplored; but, on the other hand, I see distinct cause for pride in the achievements of our brethren in a new field of endeavor and for joy in the enlarged opportunity for useful and honorable service which the future opens to us."

A Fearless Fighter

In the handling of litigated matters a client has the right to expect his lawyer to leave no stone unturned to win his case. He has a right to expect him to be a fair but fearless fighter for his rights. There are two sides to every question, particularly those questions that give rise to litigation. There is no royal road to the successful handling of a lawsuit. Unremitting toil and study and exhaustive investigation of both law and facts are the price of success. Brilliance alone is not enough. A client has the right to expect his lawyer to use all the brilliance of which he is possessed, but he also has the right to rely on his lawyer's painstaking care in the preparation and trial of his case and to know that he will not go into court relying on his acumen and neglect the hard work which it takes to win a lawsuit. He has a right to expect his lawyer to see that the judge does not make a mistake in applying the law to his case. There is never a time when a lawyer can feel or act with cocksureness.

Availability

A client has the right to expect his lawyer to be available when he needs him and to be prompt in keeping his appointments. Some lawyers refuse to be interrupted and insist on completing the business in hand regardless of how many people are waiting. Nothing is more exasperating to a client than to wait on and on while an indifferent receptionist refuses to announce his arrival, particularly if he is uncertain whether the lawyer is really busy or only visiting and would admit him if the lawyer knew who was waiting. It is not fair to keep a busy man waiting unnecessarily. He is entitled to know that he will be seen as soon as possible. It is the best practice to have the arrival of each client announced as he comes into the office.

Keeping Abreast of the Times

A client expects his lawyer to keep abreast of the times and to keep him advised of changes in the law which may affect his business. This makes it

good business for both lawyer and client to work out some arrangement for a regular retainer, payable monthly, quarterly, or at other regular fixed periods when necessary adjustments can be made based on the time consumed, a record of which should be kept, and the general nature of the service which has been rendered. Business and social conditions are constantly changing. The lawyer who would serve his clients must keep in touch with the times and progress as conditions around him advance. He cannot stand still and let the world go by. Laws are changing, administrative agencies are being created to take over much of the work formerly handled by the courts to meet new social conditions and the practice of law, of necessity, is changing accordingly. To some lawyers specialization seemed to present distinct advantages, but this tendency is passing as the law is too broad and too interrelated to permit satisfactory specialization. I concur in the conclusions of Mr. William L. Ransom expressed in an article which appeared in the American Bar Association Journal, from which I quote:

"From my own observation, the tendency, manifest and regretted a few years ago, to force young lawyers to 'specialize' and to shelve them in some niche or alcove of a large office, is not nearly so general today. It is found that first-class results require that all work be done by men of a broader experience and ability than this specialization produced. Many offices now refuse to permit their men to work exclusively in a single field of the law —even in such fields as taxation and estate work, which once seemed certain to be turned over to men who did nothing else. The modern law office places at the service of clients a more dependable product—the result of the work and discussions of several men, not one man only. There is an insistence on a standard of quality and a certainty of conclusive decisions which ordinarily can best be secured through a co-ordinated and co-operative handling. The expeditious handling of modern law business cannot be left to depend on the presence or absence, the health or sickness, the other engagements or the idiosyncrasies of any individual. There must be continuity of policy and treatment, as well as promptness of dispatch. Those factors have already forced a better organization of lawyers' offices in the larger cities, and are forcing the same thing, on a smaller scale, upon their brethern in the smaller cities and villages. For one, I do not believe the American lawyer has lost independence, dignity or prestige by the change."

Service

In a word a client expects his lawyer to be of service to him in the handling and conduct of his business. An eminent author has said:

"All things are of little avail, however, without the spirit of service, a desire to accomplish something worth while for others. A selfish desire dwarfs and stultifies endeavor. Altruism broadens the outlook and leads

to real accomplishment. High ideals and a broad vision are essential factors in all constructive effort.

"Selfishnes or the lust for wealth or power dooms to mediocrity. The self-centered may gain wealth or power but it is the wealth of a miser or the power of a pirate. Altruism is the very foundation stone of success. On this foundation 'service' will rear a structure of permanent value."

A lawyer who practices his profession with the purpose and object of rendering the best service to his client can always maintain his self respect and command the confidence of his client, which after all is said is his best stock in trade. A lawyer is constantly called upon to decide nice questions of propriety and legal ethics. He must beware of pitfalls and blind ways that may lead into compromising positions. No lawyer can afford to take any chances. A client may sometimes ask a lawyer to do things that he would not think of doing himself. Such a client knows that any lawyer who will pull a shady deal for him would not hesitate to pull the same kind of a deal against him. If confidence is thus undermined the value of the lawyer's legal advice is destroyed. A client will respect the lawyer who maintains his self respect. It is the lawyer of high standing and integrity who has the ability and courage to back it up to whom the client turns in time of real need.

Charging a Reasonable Fee

Finally a good client expects his lawyer to charge a reasonable fee for services rendered. To most lawyers the task of rendering bills and collecting money from clients is one of the most distasteful sides of the practice. Too many of us put off the sending out of statements until the dwindling bank account makes the sending of a bill a necessity. Indeed, I have read of one lawyer who said he had not sent astatement to a client for a period of ten years. Other lawyers adopt the practice of sending a bill for all the traffic will bear. The services which a lawyer sells cannot usually be measured by any ordinary rule or measured or weighed in a regulation scale. In the business world it is common practice to render monthly statements on which prompt payment is expected. Certainly as soon as a case or transaction is closed and disposed of a bill should be rendered to the client, and if the matter extends over a long period of time bills should be sent from time to time to apply on account until the matter is concluded. No client will think any less of a lawyer for having rendered his bill promptly.

While no exact measuring stick can be applied in all cases in determining the value of a lawyer's services there are certain elements that may well be considered in determining the amount of a bill for services. Some of the things to be considered are:

1. The time consumed.
2. The amount or value of the property involved.

3. The nature of the matter as to the difficult character of legal questions involved.

4. The ability of the client to pay.

5. After all other questions have been fairly considered be absolutely impersonal in fixing the amount of the bill.

Explanations are unsatisfactory and apologies are unnecessary. A lawyer is entitled to fair pay for the only thing he has to sell, which is service. However a client has the right to know what his lawyer has done, much of which may have been done without his knowledge. It is of interest to him to know something of the amount of time consumed. The lawyer should also know how much time he has spent on a given matter by himself and his associates so that he can in a measure determine the amount of his investment in the subject of his bill. This makes necessary the keeping of a record of time consumed in the handling of each matter in his office. Some clients will be irked by itemized statements. Others are more easily convinced of the value of a lawyer's services by a detailed statement, showing time consumed and the exact nature of each item. Some transactions and trust accounts require a full accounting that can be handled only by such itemized statements. In any event a client is entitled to know what his lawyer has done when a bill is sent to him. Such a bill should either itemize the service rendered or contain a statement in narrative form, covering his handling of the entire matter and fixing a lump sum to be paid for the services rendered.

As a fitting close to these desultory remarks I refer to and quote the paragraph from the Cannon of Ethics of the American Bar Association covering "The Lawyer's Duty in its Last Analysis":

"No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive, nor should any lawyer render, any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man as as a patriotic and loyal citizen."

Legal Institute

The committee in charge of Legal Institutes announces a change in date of the first institute. The first institute will be held December 4, 1948, at the hour of 9:30 a.m. in the auditorium of the Telephone Company.

The reason for the change in plans is the acceptance of an invitation extended by the committee to Robert N. Denham, General Counsel of the National Labor Relations Board. Mr. Denham was unable to be present November 20 but graciously consented to be present on December 4. Because of his efforts to accommodate the committee, it was decided to change the date of the institute in order to obtain such an outstanding speaker. Accordingly, the panel of speakers to cover the field of labor management relations will be:

ROBERT N. DENHAM, General Counsel of the National Labor Relations Board.

SAM SHERMAN, Denver Attorney representing the viewpoint of management.

WILLIAM BERG, JR., Professor of Labor Law, University of Colorado, presenting labor's objections to the Act.

A portion of the institute will also be devoted to problems arising under the wage hour law, with the following speakers:

REID WILLIAMS, former attorney of Denver, now Regional Director of the Wage Hour Division with headquarters in Kansas City, Missouri, presenting the viewpoint of government.

RICHARD W. WRIGHT, attorney associated with the Mountain States Employers Council, presenting the viewpoint of management.

CHARLES A. GRAHAM, Denver attorney, presenting the viewpoint of labor.

With such an outstanding array of talent, it is certain the program offered will prove to be most worthwhile and one of the outstanding institutes of the year. Mark this date on your calendar:

December 4, 1948, 9:30 a.m.: Auditorium of Mountain States Telephone and Telegraph Company.

The cooperation of the Telephone Company in accommodating this change of dates is most genuinely appreciated for without the auditorium it would not have been possible to arrange for the institute at this later date. Thanks are again expressed to the Mountain States Telephone and Telegraph Company.

Clayton Chauncey Dorsey

By JOSEPH C. SAMPSON, *of the Denver Bar*

In the death of Clayton Chauncey Dorsey on September 22, 1948, the Denver Bar has lost one of its most truly distinguished members.

Born in Sandusky, Ohio, March 21, 1871, the son of Stephen W. Dorsey, one time United States Senator from Arkansas, and Helen M. Wack, he lived much of his early life in Washington, D. C., and later on his father's ranch near Springer, New Mexico. He was educated at Oberlin College and Yale University, receiving his B.A. degree from Yale in 1890.

Mr. Dorsey did not attend a law school, but studied in the office of Teller (Henry M.) and Orahood and was admitted to the bar of Colorado in 1893 and was employed by said firm and its successor, Teller, Orahood and Morgan. He practiced alone from 1899 to 1900. In 1900 he formed a partnership with Mr. Willard Teller, which association continued until 1905, when Teller retired. Then he formed a new partnership with William V. Hodges. Dorsey and Hodges continued until the organization with Gerald Hughes in 1911, of Hughes and Dorsey, of which firm he was an active partner until his retirement in 1937.

Mr. Dorsey married Miss Marguerite Montgomery in 1897, and she, as well as their two children, Helen (Mrs. Edward G. Knowles) and Montgomery Dorsey, survive.

For many years Mr. Dorsey represented the Union Pacific Railroad, being made its General Attorney in 1905, which position he held until his retirement in 1937, handling all that company's important litigation in Colorado. He was instrumental in bringing about the settlement of the celebrated controversy between the Union Pacific and the Southern Pacific over the control of the Central Pacific, the connecting link between Ogden and San Francisco. He represented the predecessor companies of the Denver Union Terminal Railway and advised that company at the time of its organization in 1914 and the building of the present Union Depot, which involved extensive litigation.

Mr. Dorsey represented The Denver Union Water Company in its many controversies with the City of Denver over the acquisition of the water plant, earning recognition as an expert in the handling of valuation matters. He advised in connection with the reorganizations of the Denver Tramway and the Moffat Road, and of many other corporations. One of his later legal triumphs was establishing the validity of certain of the Moffat Tunnel Improvement District Bonds.

When in the early thirties questions arose as to the exemption from taxation of property belonging to Denver University, Mr. Dorsey carried through

the Supreme Court of Colorado a fight to establish the tax exemptions which had been granted to the Colorado Seminary, the University's corporate name, in its special charter granted by the legislature in 1864.

Mr. Dorsey had an enviable record as an accomplished trial lawyer. He appeared many times before the Supreme Court of the United States and counted as personal friends many members of the Court, especially Justice Charles Evans Hughes and Justice Willis Vandevanter. Much of his litigation was in the federal courts and he was always *persona grata* to the judges of the Eighth Judicial Circuit, and later of the Tenth Judicial Circuit.

Mr. Dorsey was active for many years in the clubs of Denver, maintaining membership in the University Club, the Denver Club, and the Denver Country Club. He was a member and actively interested in the Denver, Colorado, and American Bar Associations. In 1924 he joined the group of members of the American Bar Association who journeyed to England for the historic meeting which was held there.

A staunch and influential Republican, though often urged to allow himself to be considered a candidate for judicial or other appointment, he remained a faithful party man without personal political ambition.

He was interested in civic affairs and for years he served the Children's Hospital as counsel and of late years as a member of its advisory board. His church affiliation was with St. John's Cathedral.

Known for his professional attainments, not only in his home state of Colorado, but by his fellow-lawyers throughout the nation, Clayton Dorsey will always be remembered as representing the finest standards and traditions of the legal profession.

Throughout his many years of practice, he established a reputation for professional ability and unquestioned personal integrity which has never been surpassed by any member of the Bar.

Unfailing in his courtesy and consideration for others; meticulously ethical and conscientious in all his professional relationships, whether with courts, clients, jurors, or witnesses; invariably and sincerely modest and unassuming in both manner and attitude; tirelessly energetic in the performance of duty; a devoted husband and father and a faithful friend—Clayton Dorsey provides a model pattern for every young lawyer to emulate. If one were to sum up his life and character, it could be done, without the least overstatement, in these few words: A great lawyer and a Christian gentleman.